

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**



74-1336

To be argued by  
HOWARD L. GANZ

**United States Court of Appeals**

FOR THE SECOND CIRCUIT

Nos. 74-1336 and 74-1495

LORENZ SCHNEIDER Co., Inc.,

*P/S*  
*Petitioner,*

—against—

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON PETITION FOR REVIEW AND TO SET ASIDE AND CROSS-  
APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

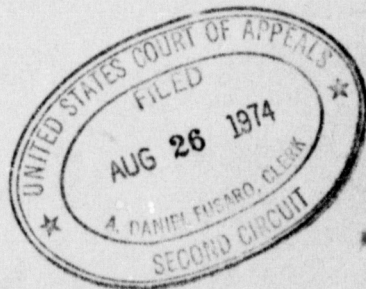
**BRIEF FOR LORENZ SCHNEIDER CO., INC.**

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## BRIEF FOR LORENZ SCHNEIDER CO., INC.

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### Preliminary Statement

The Decision and Order of the National Labor Relations Board which is the subject of this appeal was rendered by a three-member panel of the Board (Chairman Miller and Members Fanning and Penello) and is reported at 209 NLRB No. 16 (Feb. 22, 1974, as amended Feb. 27, 1974). The Board's Decision on Review in the "underlying" representation case was rendered by the same panel and is reported at 203 NLRB No. 45 (April 25, 1973).\*

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\* Pursuant to Section 9(d) of the National Labor Relations Act, 29 U.S.C. §159(d), the record in the representation proceeding is part of the record before the Court on its review of the Board's order in the unfair labor practice proceeding.

### **Statement of the Issue**

Whether, based upon the evidence—indeed, upon the factual findings made by the Board itself—and in light of the applicable case law, the distributors involved in this proceeding are “independent contractors” within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. §152(3); and thus whether the Board’s orders certifying, and directing the Company to bargain with, a representative of such distributors were improperly issued?

### **Statement of the Case**

#### ***Nature of the Case***

On this appeal, Lorenz Schneider Co., Inc. (the “Company”) petitions for review and to set aside, and the National Labor Relations Board seeks enforcement of, a decision and order of the Board, concluding that the Company had engaged in certain unfair labor practices and directing it to bargain with an organization known as the Independent Routemen’s Association (“IRA”) with respect to the terms and conditions of employment of a group of 52 “distributors.”

Seven years ago, and with the approval of the union then serving as their collective bargaining agent, the individuals involved here (or their predecessors) voluntarily sought and explicitly agreed to give up their status as “employees” and embark upon their own business ventures as “independent contractors.” The principal issue to be determined in this proceeding is whether, as the Board concluded, these distributors (who purchase certain products from the Com-

pany which they resell for a profit to retail food stores) have somehow again become "employees" within the meaning of Section 2(3) of the NLRA, 29 U.S.C. §152(3).

If, contrary to the Board's conclusion, these distributors are "independent contractors," the unit consisting of such distributors as certified is inappropriate, and the Board's bargaining order must be set aside.

### ***The Proceedings Before the NLRB***

Following a hearing conducted on various dates during the period May-August 1972, the Regional Director for Region 29 issued a Decision and Direction of Election, dated October 3, 1972.

Although the *findings* set forth in that decision clearly support the Company's assertion of independent contractor status (and although its author himself noted the presence of at least "certain factors which are usually associated" with such status, 377a\*) the Regional Director concluded that the distributors were "employees" within the meaning of the Act.\*\*

Apparently finding "compelling reasons" therefor,\*\*\* the Board granted review with respect to the questions

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\* Numerical references followed by "a" refer to pages of the Joint Appendix.

\*\* Significantly, the Regional Director's decision was issued prior to the Board's decision in *Gold Medal Baking Co., Inc.*, 199 NLRB No. 132 (Oct. 27, 1972), in which distributors, subject to greater control than the distributors here, were held to be independent contractors. The Board's failure to follow or meaningfully distinguish *Gold Medal* is discussed more fully below. See pp. 47-50, *infra*.

\*\*\* See 29 C.F.R. §102.67(c), which sets forth the narrow grounds upon which the Board grants review of Regional Director decisions in representation cases.

concerning the status of the distributors. With one significant exception,\* its Decision on Review affirmed the Regional Director's findings and conclusions.

Subsequently, the IRA received a majority of the votes cast in the ordered election, and was certified as the distributors' exclusive bargaining representative. When the Company refused to bargain, the IRA filed a charge under Sections 8(a)(5) and (1) of the Act, which laid the foundation for this appeal.

After issuance of a complaint, the General Counsel moved for summary judgment, and the proceeding was transferred to the Board. On February 22, 1974, the Board issued its Decision and Order granting the General Counsel's motion and directing the Company to bargain with the IRA.

While the General Counsel's motion was pending, there was submitted to the Board a ruling issued by the Internal Revenue Service ("IRS") concerning the status of the distributors for federal employment tax and income tax withholding purposes. The IRS, applying a "right to control" test,\*\* concluded (based on information supplied by the

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\* The Board found erroneous the Regional Director's conclusion that the distributors were restricted from carrying any products other than those sold to them by the Company. According to the Board, the record established that the distributors were free to carry and sell other products, so long as such products did not compete with the Company's products. [397a.] The evidence clearly establishes that the distributors have exercised this right and have in fact sold such other products. [See 53a-54a.]

\*\* According to the IRS ruling, "an employer-employee relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished." [456a-457a.]

Company and ten distributors) that the distributors were not employees.

In its decision of February 22, 1974, the Board declined to follow the IRS conclusion because, *inter alia*, the ruling "made no mention of either our [*i.e.*, the Board's] Decision or the record developed in the representation case and there is no indication that IRS had any knowledge of them . . . ." [467a-468a.]

On February 27, 1974, the Board issued an order amending its Decision and Order of February 22. In this amendment, the Board acknowledged receipt of a copy of a letter written by the Acting Chief, Individual Income Tax Branch, of the IRS, stating that, at the time of its ruling, the IRS had in fact been aware and was in possession not only of the Board's Decision on Review in the representation case, but also of a so-called "book of procedures," an exhibit upon which the Board had heavily relied.\*

The Board's response to this conflict between two agencies of the federal government was simply to delete that portion of its February 22 Decision which suggested that the IRS had lacked any knowledge of the NLRB proceedings.\*\*

The Company's petition for review and to set aside the Board's Decision and Order, as amended, was filed in this Court on March 13, 1974. The Board's cross-application for enforcement was filed on April 22, 1974.

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\* See 479a-480a; 461a.

\*\* Strangely, in light of the IRS correspondence it had received, the Board continued to rely upon the Service's failure to "mention" the NLRB proceedings as one of the reasons for refusing the IRS ruling deference. [Compare 467a-468a with 479a-480a.]

## Statement of Facts

### *Preliminary Statement*

The individuals whose status is now in controversy were—until 1967—undisputedly “employees.” Known until then as “route salesmen,” they operated the (Company-owned) vehicles in which the Company’s franchised products were delivered to its retail customers. The route salesmen were represented by Local 802 of the International Brotherhood of Teamsters and their terms and conditions of employment were prescribed by a collective bargaining agreement.

In 1967, following collective bargaining negotiations which were marked by lengthy strikes, the agreement with Local 802 was amended, and the Company secured the right to sell its customer routes to those employees desiring to purchase them. This marked a fundamental alteration in its method of operations.

As is shown more fully below, this change was clearly intended—by the Company, by Teamsters Local 802, the former collective bargaining agent, and by the route salesmen themselves—to accomplish a change in the status of the route salesmen from employees to independent contractors.

Commencing in or about February 1967, and with Local 802’s concurrence, most of the Company’s then route salesmen-employees entered into individual distributorship agreements by which they purchased—for sums in the neighborhood of \$20,000—the exclusive right to sell and service the Company’s former customers. Each of these agreements—and similar agreements executed by others since 1967—expressly declared that the purchasing-dis-

tributor was to be an independent contractor. Each specifically negated the continuation or creation of an employer-employee relationship. Upon each such purchase, the distributor gave up his union membership (with the Teamsters' concurrence) and collected his accumulated share from the Company's profit-sharing plan.

Since this fundamental change was effectuated in 1967, Local 802 has not asserted any rights of representation with respect to the individuals whose status is in dispute, although that Union continues to represent and has continued to attempt to organize others employed by the Company, including route salesmen who have remained or are "employees." Indeed, Local 802 was given notice of the representation proceedings conducted in this case and did not appear.

Moreover, from 1967, when the initial distributor arrangements were made, until 1972, when this proceeding was commenced by the IRA, the record reveals no change in the Company's method of operation. Indeed, several of the individuals who, by this proceeding, demand the collective benefits of union representation are the same persons\* who, seven years ago, willingly surrendered those benefits and voluntarily assumed independent contractor status—apparently for the prospect of greater individual financial gain.

We recognize, of course, that it is the facts of the relationship between the distributors and the Company—the degree of the Company's "control" over the manner and means by which the distributors perform their services—that will control the judgment reached as to their status. And we will show that the administrative conclusion on this

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\* See 216a-217a.

issue has no substantial basis in the facts adduced, indeed, contradicts the facts as found.

But, in addition, we submit that this Court should regard—as the Board disregarded entirely—the equal basis upon which the Company's assertion of independent contractor status also rests. Seven years ago, petitioners openly and directly bargained for and obtained from a duly authorized collective bargaining representative the individuals here involved (or their predecessors) the right to conduct its business in a certain manner—a manner—entirely different from the way its business had historically been conducted, and one which enabled the aspiring and ambitious among the employees to embark upon independent business ventures of their own. There is absolutely no suggestion that the parties to that bargain—including several of the individuals in whose behalf the present proceedings were initiated—intended and agreed that those who had been “employees” would and did become “independent contractors.” On the basis of the record, we submit that there is no reason why this bargain should now be dishonored.

***The Conditions of the Employment of Route Salesmen Before the Collectively-Bargained Change in Their Status***

The Company is, and has been for many years, a so-called “key” dealer or franchised distributor in parts of the New York Metropolitan Area for snack food products with well known brand names (e.g., “Wise” potatoes, “Old London” and “Quinlan” pretzels). [See 374a; 1

The Company purchases these products from independent manufacturers, warehouses them in two Long Island City, and provides for their resale to retail food stores. 25a, 54a.]

Prior to 1967, the Company distributed snack food products directly to the retail outlets within its franchised distribution area, employing a group of route salesmen who, by the use of Company-owned trucks, made deliveries to the customers whose business the Company had secured. [45a, 80a.]

As we have noted, these route salesmen, undisputedly "employees" within the meaning of the Act, were represented for purposes of collective bargaining by Teamsters Local 802 [80a, 81a-82a], and the nature and details of their relationship with the Company were collectively bargained and prescribed by an agreement between their Union and the Company.

Under the collective bargaining agreement [346a *et seq.*] route salesmen employees were *guaranteed* a basic weekly wage plus a certain percentage commission of sales. [348a, 350a.] In addition, the salesmen were entitled to specified monthly bonus payments dependent upon their average weekly sales, and the Company again *guaranteed* that a certain amount of bonuses would be paid to each employee notwithstanding his failure actually to "earn" such bonuses by attaining a certain level of sales. [349a-352a.]

Further, the collective agreement provided the route salesmen with various fringe benefits. Thus, they were entitled to a certain number of paid "sick days" per year [355a]; had contributions made by the Company on their behalf to a union welfare plan [355a-356a]; participated in certain profit-sharing arrangements [356a]; and received pay when called for jury duty. [363a-364a.]

Prior to 1967, the work schedule of the route salesmen was also carefully structured by the collective bargaining agreement. Route salesmen were required to work a five

day week, and daily to service the Company's retail customers to the Company's satisfaction. [365a.] They were entitled to certain, specifically designated paid holidays, but only if they worked the day preceding and the day following each such holiday. [358a-359a.] Route salesmen received vacations, the length of which were prescribed by the collective agreement and which varied depending upon length of service. They could not select vacation periods freely, but rather were required to choose vacations according to seniority. [356a-358a.]

Prior to 1967, all route salesmen were assigned a prescribed "route" comprised of various retail accounts. When a route became open, the Company was required by the collective bargaining agreement to post such routes for bidding by the salesmen employees. [361a-362a.] Thus, for example, one route salesman, originally assigned to Manhattan, subsequently "bid on" (on the basis of seniority) and secured what apparently were to him more attractive routes in other parts of the New York Metropolitan Area. [231a-233a.]

The route salesmen, who were required to wear uniforms furnished by the Company [360a], made deliveries to the Company's retail customers by the use of Company-owned trucks, and were forbidden from using these trucks for the purpose of selling any items other than those designated by their employer. [365a.]

Finally, route salesmen were subject to close and continuous supervision and control by the Company. It was apparently not unusual for a supervisor frequently to accompany a salesman upon his route [242a], and whether a salesman-employee would be accompanied was a decision made by his supervisor. As one IRA witness put it, prior to

1967 the salesmen had "no say" in the matter. [252a-253a.] Supervisory personnel went with the salesmen into the retail stores themselves, assisted the salesmen in keeping records, and sought to solicit additional display space for the products delivered by the route salesmen. [173a-174a, 200a-201a.] In sum, these supervisors "were completely responsible for the [sales]men, for their activities on the route." [201a.]

Prior to 1967, then, it is clear that the Company possessed and exercised the right to control the manner and means by which the route salesmen performed their services, as well as the result sought to be attained—increased sales of the Company's franchised products.

***The Strikes by Local 802 and the Company's Bargained-for Right to Sell Its Customer Routes***

As it is clear that in the years prior to 1967 the Company conducted its distribution business by the use of "employees," so it is clear that in 1967 a significant and fundamental change in its method of operations occurred—a change which, as even the Regional Director recognized, brought with it at least some sort of a "change in status" of the individuals involved here. [371a.]

During its 1967 collective bargaining negotiations with Local 802, the Company proposed that it be given the right to offer to sell its customer routes to the then-employed route salesmen who would, upon the acceptance of such offer, become independent contractor-distributors. [See 80a, 81a-83a, 85a-86a, 364a.]\* This proposal was apparently one

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\* Although the record is not clear as to the exact reasons for the Company's proposed change in operations, the collective bargaining agreement between the Company and Local 802 records the parties' recognition of significant changes in the retail food

of the factors which led to a lengthy strike by the employees, including the route salesmen, represented by Local 802. [82a-83a.]

Ultimately, the Company and Local 802 reached an agreement which accorded the Company the right it had sought. That agreement authorized the Company to effect a "change in its method of distribution by the sale of routes to its route salesmen," and contemplated that the Company and each route salesman who elected to purchase a route would enter into an "individual distributor agreement," the terms of which could be negotiated directly by the Company "with interested salesmen and their respective attorneys." [364a.]

Although the Board concluded that the Company "*required* its route salesmen to execute distributorship agreements" [399a\*], it is clear that no such "requirement" was imposed. The collective bargaining agreement provided for continued union-management discussions "relative to those route salesmen *who have not purchased their routes and who remain in the bargaining unit*" [365a], and there were, in fact, route salesmen who declined the Company's offer and continued to be represented by the Union. [86a.] Indeed, one of the distributors himself testified that the route salesmen "had the option" to remain employees or

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business and "the appropriateness of considering changes in delivery, merchandising and compensation methods" as a result thereof. [352a-353a.] The Company's desire to sell its routes was also the subject of much litigation, in which it appeared that at least several route salesmen were intent upon becoming independent businessmen despite their union's initial and active disapproval. See *Chupka v. Lorenz-Schneider Co.*, 12 N.Y. 2d 1, 233 N.Y.S. 2d 929 (1962).

\* Unless otherwise noted, emphasis in quoted material has been supplied.

to buy routes and become independent contractors. [216a.] Those exercising the option were, in the words of another distributor who now claims status as an employee so as to add to the benefits of his proprietorship the benefits (and immunities) of collectivism sacrificed years ago, “. . . union men who ran their routes and then purchased their routes.” [215a.]

And that these former “union men who ran their routes and then purchased their routes” regarded themselves as occupying a new status following such purchase is made clear by their subsequent conduct.

A few months after certain routes were sold, Local 802 conducted another strike of the *employees* represented by it—and that strike was joined by the route salesmen who had declined to purchase routes, but *not* by those *former* route salesmen who had become “distributors.” [85a-86a.]

Significant also is the fact that, although Local 802 has continued to represent the Company's employees—and, indeed, has attempted to organize additional members of the Company's work force\*—it has not since 1967 asserted the right to represent any of those former route salesmen-employees who purchased routes and thereby became independent distributors. [85a, 86a-87a.]

***The Sale of Routes to the Route Salesmen and the Execution of the Independent Distributor Contracts.***

Following its agreement with Local 802, and in or about February 1967, the Company commenced negotiations with individual route salesmen respecting their purchase of routes. As we have already noted, the route salesmen were

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\* See 5a-17a.

encouraged by the collective agreement to retain their own individual counsel [364a], and they apparently did so. [241a, 243a-245a.]\*

The individual agreement entered into by each distributor gave the distributor the exclusive right to sell and deliver products to a designated group or "route" of retail accounts and such other accounts within the Company's franchised area as he could develop. The purchase price for each such route was calculated by multiplying the average weekly sales on the route by a given factor [371a], and the total price for each route seems generally to have exceeded \$20,000. [217a-218a, 259a.]

As the Regional Director found, the purchasers of routes from the Company have each made "large initial down payments." [371a.] The record in fact indicates that the *smallest* down payment ever accepted by the Company has been \$4,500, and, indeed, that one purchaser of a route paid the full purchase price in cash. [38a-39a.] In addition to the down payment, each distributor was required to execute an interest-bearing promissory note, secured by a chattel mortgage, for the unpaid balance. [372a.]

Over the years since 1967, six different, but essentially identical, forms of distributorship agreements have been used. Each agreement specifically negates the creation of an employer-employee relationship and explicitly records the parties' agreement as to the independent contractor status of the distributor-purchaser. The following language is contained in each agreement:

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\* One IRA witness said he had been given six months' notice of his right to purchase a route and that he had consulted and reviewed the proposed distribution contract with an attorney who accompanied him to the closing. [243a-245a.]

"The DISTRIBUTOR agrees that the DEALER [i.e., the Company] shall not be liable for any act or acts of the DISTRIBUTOR, nor shall the DISTRIBUTOR bind or attempt to bind the DEALER in any manner, and nothing herein contained shall be construed as creating the relationship of Employer and Employee between the parties, that the DISTRIBUTOR shall be deemed at all times to be an independent contractor." \*

The distributorship agreement describes the Company as a "franchised dealer" for "several specialty food products" with "an established business with customers such as chain stores, co-operative associations and independently owned stores" in its franchised area, and records the purchaser's desire to become a distributor for the sale of such products. [295a, 305a.]

The agreement obligates the Company to sell merchandise to the distributor at "prices listed" for the distributors, and recites the distributor's undertaking "to use his best efforts to distribute, procure sales for, to obtain increased space, new accounts, to merchandise and otherwise to increase the volume of sales" of the Company's franchised products. [297a, 307a.] With respect to the distributor's resale of such products, the agreement provides specifically that the distributor "is free to establish his gross profits." [298a, 308a.]

The distributorship agreement clearly contemplates and permits the distributor's solicitation of new accounts within the Company's franchised area. [See 297a, 307a.] Moreover, the distributor is free to sell off some or all of the

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\* See, e.g., 298a, 308a. The record indicates that the cited forms of agreement are those most recently in use. See 318a-319a.

customers purchased (and/or added) at any time to another distributor or to "an accredited buyer" [299a, 309a]—a right that would of course encourage distributor solicitation of new customers which in turn would enlarge the Company's sales.\*

In the event of a sale by the distributor of his entire route, the distributor agrees "not to re-enter a business of distributing the same or like products for a period of one (1) year, to customers serviced by him." [303a-304a, 314a.] The agreement contains no restriction upon the distributors' sale of other products, save only those in "direct competition" with those purchased from the Company. [301a, 311a.]

The distributorship agreements are terminable by the Company only upon certain specified conditions, and provide that disputes which cannot be amicably resolved may be submitted by either party to final and binding arbitration. [300a-303a, 310a-313a.]\*\*

The agreements provide no guaranteed amounts of compensation to the distributors; grant no rights to vacation, sick days, or other forms of "fringe benefits"; contain no provisions with respect to their schedule of work; and, in general, are silent with respect to the day-to-day operations of the distributors' business.

The agreements do reflect an undertaking by the distributors to "abide by" the Company's so-called "Book of Pro-

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\* The agreement suggests another reason why such "sell-offs" would be favorably regarded by the Company—and that is because they would likely produce funds enabling more rapid payment of the purchase price balance. [See 296a.]

\*\* Six contracts entered into by distributors in 1967 did not contain arbitration clauses. [See 135a-136a, 315a.]

cedures" [304a, 314a], a matter made much of by the Board. [See 398a-399a, n. 3.]

As is shown more fully below, the provisions of this procedure book (as the Board itself, at least partially, acknowledged) are hortatory. They are no more than suggestions based upon the Company's long experience in the snack food business—suggestions which, in any event, have been disregarded by the distributors. The non-mandatory nature of the Book of Procedures is confirmed by the distributorship agreement. That agreement neither entitles the Company to terminate the arrangement, nor calls for the imposition of any other penalty, on account of a distributor's failure to "abide by" the procedures.

In sum, the distributorship agreements provide for the acquisition—for large sums of money—of a valuable and transferable proprietary right. Except in the most general terms, the agreements leave the manner in which that right is to be pursued within the distributor's discretion. And, as we show in the following sections of this brief, the actual conduct of the relationship between the distributors and the Company has preserved the independent contractor status explicitly intended and created by the distributorship agreements.

***The Presence in the Record of All Criteria Critical to the Conclusion of Independent Contractor Status.***

Many of the *findings* made by the Regional Director and affirmed by the Board support our contention as to the independent contractor status of the distributors. Indeed, substantial portions of the Regional Director's Decision were needed simply to recite these "positive" findings.

In our view, the Board's *conclusion* bears no logical relationship to these findings or to the plethora of other factors favoring independent contractor status. As we show below, the distributors function in all critical respects as independent contractors.

*The Distributor's Compensation.* Unlike their route salesmen-predecessors, the distributors involved in this proceeding receive no guaranteed compensation.

A distributor's compensation or profit is the difference between what he pays the Company for the franchised products and what is charged the retail stores to which he resells. [111a.] While the distributorship agreements suggest that the usual mark-up or profit is approximately 20%, the distributors are, by contract and in fact, free to establish their gross profits. [298a, 373a.]

The Company makes no withholdings for taxes or any other standard payroll deductions, and pays no disability or workmen's compensation premiums. [67a-68a, 374a.]

The distributors receive no fringe benefits. [237a-239a.] Indeed, their participation in the Company's profit-sharing plan terminated with their purchase of routes in 1967, at which time they received their appropriate shares. [251a-252a.]

*The Distributor's Proprietary Rights and the Entrepreneurial Nature of His Business.* The substantial down payments of \$4,000-\$5,000 made by the distributors and the large financial obligations—usually in the area of \$20,000—undertaken by them upon their purchase of routes suggest the acquisition of a valuable proprietary right and an accompanying unwillingness to surrender to the Company control of the manner in which that right is exercised.

The existence of this proprietary interest and the advantages flowing therefrom are confirmed by the evidence. Thus, for example, the distributors have the right to "sell off" all or part of their routes to others. Although the distributorship agreements suggest that such sales may be made only to "an accredited buyer," the record indicates that (whatever rights this language may give to the Company which extends credit weekly to the distributors, see 297a) no proposed sale of a route or part thereof has ever been prohibited. [78a-79a, 197a.]

Distributors have frequently sold all or part of their routes to third parties at whatever price the market may bear. [78a-79a, 372a.] And the distributors have apparently profited handsomely as a result of such sales. Thus, for example, one distributor, whose total annual earnings in 1971 were about \$14,000, sold certain of his accounts for \$6,000. [246a-247a, 251a.]

The record also makes clear that in servicing their accounts the distributors reap the benefits and are saddled with the burdens of the ordinary independent business man or entrepreneur.

By increasing their volume of sales pursuant to the undertaking contained in the distributorship agreements, the distributors will, of course, increase their earnings. Similarly, the distributors' freedom to sell other than the Company's franchised products—a practice permitted by the distributorship agreement and engaged in by at least some of the distributors [53a-54a]—enables them to better their compensation.

Moreover, as the Regional Director noted [373a], distributors are free to solicit new accounts within the Com-

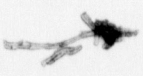
pany's franchised area, and successful solicitation will also enlarge their profits.

In addition, the distributors can and have increased their earnings by over-stocking products when special promotions are conducted by the manufacturers. During these special promotions, manufacturers reduce their prices to the Company and the Company, in turn, reduces its prices to the distributors. Although these promotional price reductions remain in effect for only limited periods, distributors can, if they wish, buy at the reduced prices more merchandise than their customers have ordered. Indeed, at least one distributor has occasionally purchased a "trailerful" of such reduced-price goods, and sold the merchandise at the higher regular prices after the promotion has ended. If the distributors are willing to assume the business risk inherent in this procedure, they can, of course, reduce their effective costs and increase their profits. [75a-76a, 115a-116a.]

As the distributors may profit by their own efficiency and efforts, so must they pay a price for their independence.

When a distributor buys from the Company more merchandise than he can sell, the Company policy ordinarily is not to accept the return of such surplus. On the occasions when returns of over-ordered products are permitted, the Company charges the distributor a fee for each case of goods returned. [184a-186a.]

When a distributor extends credit to a retail account or accepts checks in payment (as it is the *distributor's* prerogative to do), he—not the Company—bears the risk of default and dishonor. [60a-62a, 207a, 375a-376a.]



When a *distributor* decides to go on vacation or simply to take a few days off, he may do so at any time. [374a.] And it is the distributor—not the Company—who is responsible for servicing the customers during these periods. As the Regional Director found, the distributors can hire their own vacation replacements or, for a fee and depending upon their availability, hire Company employees. [374a.] When a Company employee is hired, the earnings on the route during the period of the distributor's absence are turned over to the distributor, not kept by the Company. [69a-70a.]

*The Distributor's Obligation to Furnish the Essential Tools of Trade.* Unlike the ordinary employee, and more like the independent businessman, it is the distributor—and not the Company—who is charged with the responsibility for and expense of supplying the equipment necessary to the conduct of the business.

The evidence is clear that the distributors must furnish their own trucks and may purchase (as approximately 30% have) or lease such vehicles from any source. [374a; 45a-46a.]

Various items used by the distributors in connection with their sales (such as stands, shelving, and sales pads) must also be provided by the distributor himself. These items may be purchased from the Company, or may be—and have been—obtained by the distributors from other sources. [51a-52a.]

While the Company maintains warehouse facilities, it does not require the distributors' use thereof. In fact, as the Regional Director found [375a], at least two distributors maintain their own warehouses and receive products directly from the manufacturers. [55a, 206a.] Distributors

who elect to use the Company's warehouse are required to pay a fee therefor [60a], the amount of which has indeed been the subject of litigation between the Company and several distributors. [112a-113a.]

*The Distributor's Control of His Own Schedule and Daily Activities and the Absence of Day-to-Day Supervision by the Company.* The distributors have complete freedom with respect to the frequency and hours of their labor. [374a.] Unlike the situation prior to 1967 (when the collective bargaining agreement required route salesmen to work five days per week), the distributors' time is their own. There is no fixed schedule of days per week or hours per day. Vacation and days off can be taken at any time; no permission from or arrangement with the Company is necessary. [374a; 63a-64a, 66a, 69a, 191a, 218a.]

Indeed, the individual purchaser of a route need not himself ever work at all. As the record makes clear, a distributor may hire other individuals to do the work for him, and some distributors have in fact done so. According to the testimony, there is no requirement that the Company even interview the individuals so hired. [66a.]

The Board found also that "there is no day-to-day supervision of the distributors" by the Company. [374a.] Nor does the Company require that retail stores be serviced in a particular order or on a particular day. [70a-71a.]\*

Unlike the situation prior to 1967, when Company supervisors "rode" with the route salesmen whenever and as frequently as the supervisors wished, Company personnel

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\* We deal below with the erroneous administrative conclusion [374a, 398a-399a, n. 3] that the distributors "must" service each account at least once each week.

(known as "Distributor Representatives" or "DR's") now accompany a distributor on his route only upon the distributor's request. [26a-27a, 73a.] If the distributor requests assistance from the Company in pursuit of their mutual goal—increased sales of the Company's franchised products—that assistance is provided by the DR, whose principal objective is to improve sales. [25a-29a, 153a-156a.]

Upon a distributor's request or upon complaint from a retail customer, the DR may meet with and counsel the distributor. But the suggestions made during these discussions are clearly that—*suggestions*—and, according to the testimony of an IRA witness, the Company does not force or require the distributors to abide by such suggestions. [219a.] Indeed, the testimony shows that such suggestions have at times been completely disregarded. [76a-77a, 221a-222a.]

The Company has no rules or regulations and issues no instructions with respect to the quantity of goods ordered and sold by the distributors. [59a.] Ordinarily, once the distributor establishes a relationship with a retail store, he is relied upon by the store management to review the store's inventory and make the judgment as to the quantity of merchandise needed. In other cases, the store manager reserves to himself the determination. If a retail account complains to the Company concerning the quantity of merchandise, or simply seeks additional merchandise and is unable to locate its distributor, the Company passes this information on to the distributor. It does not itself attempt to remedy the situation by delivering the requested merchandise directly. [151a-152a, 247a-250a.]

*The Company's Lack of Control Over the Prices Charged by the Distributors.* The distributors service two differ-

ent types of retail accounts—"chain stores," *i.e.*, those associated with large retail chains which arrange for the purchase of products in large quantity through a central buying office; and "independents," ordinarily smaller retail operations, the individual proprietors of which purchase goods themselves.

The Regional Director found that the distributors may set their own prices to independent customers [378a], and the record is clear that the distributors do in fact charge these independents whatever the traffic may bear. [187a-190a, 198a, 200a.] When a manufacturer runs a special promotional campaign during which prices to the Company are reduced and such reductions are passed on to the distributors, a distributor is free to grant to or withhold from his independent customers so much or so little of these reductions as he sees fit. [74a.] Similarly, the distributors may grant or withhold customer rebates traditional in the industry. [198a-200a.] The matter is simply one for bargaining between the distributors and their independent customers, who comprise about 60% of the accounts serviced by the distributors. [53a, 76a-77a, 198a-200a.]

With respect to chain stores, the situation is markedly different. As might be expected, the large retail chains, which buy in massive quantities and whose members may of course be located far beyond the Company's franchised territory, operate through central buying offices. They negotiate directly with manufacturers with respect to the kind of goods to be purchased and the prices therefor. [74a-75a, 96a-100a, 106a.]

The evidence is uncontroverted that the Company has absolutely no involvement in the price arrangements made

between the chain stores and the manufacturer. [96a, 106a, 187a, 204a.] The Company is *told* by the manufacturers what price has been set and this information is relayed by the Company to the distributors. [57a-59a, 97a-98a, 106a, 182a-183a.]

These price arrangements are the same during ordinary business periods and during special reduced-price promotional campaigns. The temporary price reductions ("TPR's") made during these promotions are set by the manufacturer without any consultation with the Company [202a-203a], and they are announced to the trade by advertisements paid for by the manufacturer. [208a-209a.]

There is, thus, no question that the distributors who service chain stores are subject to restriction with respect to the maximum prices they may charge. But this is a restriction imposed on—not by—the Company. And this "fact of life" in the snack food industry affords the Company no "control" over the distributors. Indeed, the Company is as controlled and restrained as the distributors themselves.

*The Status in Which the Distributors Hold Themselves.* As cannot reasonably be disputed, the purpose of the Company's 1967 change in operations was to switch from an "employee" to an "independent contractor" operation. And it is equally clear that the distributors continue to regard themselves as independent businessmen, not servants of an employer-master.

As the record indicates, they treat themselves for tax purposes as independent entrepreneurs. [211a-214a.] And this is a judgment, as we have earlier noted, explicitly approved by the Internal Revenue Service, whose determina-

tion appears based upon application of the same "right to control" test purportedly applied by the NLRB.

Even in this proceeding, the distributors have characterized themselves in a manner diametrically opposed to the status they seek to embrace. Thus, in the words of one IRA witness whose testimony we have already cited, the distributors "were union men who ran their routes and *then* purchased their routes." [215a.] Indeed, the president of the very organization which now demands representation rights testified that when he was a distributor (until March 1972) he conducted the business "[a]s if it were my own." [22a.]\*

### Summary of Argument

There can be no dispute that the fundamental change made by the Company in its method of operations in 1967 was intended to effect a change in the status of the former route salesmen from "employees" to "independent contractors." This intention, openly stated by the Company, was shared with the route salesmen's collective bargaining representative and the route salesmen themselves. Its effectuation was the result of agreement (both collective and individual)—not Company-decreed fiat.

Moreover, the evidence, as already discussed, reveals a plethora of factors showing that the status which the parties intended to establish was in fact created and has in fact been preserved.

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\* According to its Constitution and By-Laws, the IRA admits to membership "persons or *firms* or *corporations* engaged in the sale and distribution of confectionary and food products within the States of New York, New Jersey and Connecticut." [265a-266a.]

Notwithstanding the presence of these factors, the evidence concerning the unequivocal intentions of the parties to the 1967 arrangements, and its own findings that establish the accepted criteria for independent contractor status, the Board concluded that the distributors here involved were employees and were entitled to the kind of representation they willingly foreswore seven years ago.

As we demonstrate in Point I below, the Board's conclusion is contrary to its own findings and is not supported by substantial evidence. In certain respects, the Board's conclusion is based upon findings which are simply and clearly erroneous. In other respects, it is based on evidence of isolated occurrences, which the Board utilized to "prove" a general pattern specifically rebutted by other testimony. In still other respects, the Board, while making the proper factual findings, misconstrued their significance in the present context.

Most importantly, perhaps, the Board, while properly articulating the standard, thoroughly ignored its own "right to control" test. That test does not preclude a conclusion of independent contractor status simply because elements of control exist. It requires a careful analysis as to whether the principal's control goes to the result sought to be obtained or the means utilized to accomplish that result.

The Board failed to make this analysis. It failed to recognize that in the present case (as in most franchise arrangements), the Company and the distributors have a mutual objective—continued and increased sales of the Company's products—and that the Company may (without infringing upon the distributors' independent contractor status) exercise some degree of control over this objective. To the con-

trary, the Board appears to have regarded any element of control—whether of result or means—as indicative of employee status. This, we submit, is a patent misapplication of the appropriate standard.

In Point II, we show that the result reached by the Board in this case conflicts markedly with decisions of the federal courts in other similar, if not essentially identical, cases. Factors emphasized by the courts in other cases as indicative of independent contractor status are clearly present here. Indeed, the distributors are, if anything, less controlled than other individuals who have been found to be independent contractors.

Finally, the Board failed to follow or satisfactorily to distinguish its own decision in *Gold Medal Baking Co.*, 199 NLRB No. 132 (Oct. 27, 1972), a case decided after the Regional Director's determination here. If that determination and the Board's affirmance thereof is permitted to stand, the required consistency in the interpretation and administration of the Act will be disserved.

## ARGUMENT

### POINT I

**The Board's Conclusion Is Not Supported, But Is Rather Contradicted, by Its Own Findings Which Demonstrate That the Distributors Are Independent Contractors.**

**A. *The Company Has and Exercises No Control With Respect to the Prices Charged by the Distributors.***

Of prime importance to the Board was its conclusion that the Company "effectively controls the prices at which the distributors resell to retailers," both chain stores and independents.\*

Elaborating upon this conclusion in a footnote, the Board asserted that *the Company* "required" distributors, when servicing chains, "to abide by prices negotiated between the stores and the manufacturers . . ." When distributors serviced independent stores, said the Board, the Company "substantially controls their prices through the frequent advertisement in trade publications of price discounts on the distributors' merchandise," adding also that the Company "admittedly" does not consult the distributors prior to such advertising. [398a, n. 2.]

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\* [398a.] The Board also concluded that most retailers serviced were chain stores and that Company practice was to segregate chain store routes from independent store routes. [398a, n. 2.] Both conclusions are erroneous. The record shows that about 60% of the accounts serviced are independents and that at least several distributors serve "mixed" routes, consisting of both chain and independent stores. [53a, 210a, 230a, 254a.] Moreover, the record reveals no limitation on a chain store distributor's solicitation and acquisition of new independent accounts.

1. *Distributors May Set Their Own Prices to Independent Stores.* The Board's conclusion concerning the Company's control of the prices charged by distributors to independent stores conflicts markedly with the findings made by the Regional Director, who found and explicitly stated that "the distributors may set their own prices to independent customers. . . ." [378a.]

Moreover, the premise of the Board's conclusion with respect to the Company's control of the prices distributors charge independent stores is demonstrably incorrect.

According to the Board, the vehicle of this "substantial control" is the Company's frequent advertisement, without prior consultation, of price discounts. The fact of the matter, however, is that *the Company is neither the initiator nor the advertiser of these price discounts.* It is the *manufacturer* alone who decides whether, when, and by how much prices should be reduced. And it is the *manufacturer* who, as even the Regional Director found, places and pays for these advertisements. [375a.]

Moreover, the Board misstates the nature of these manufacturer-placed advertisements in a significant way. Contrary to the Board's suggestion, these price discounts are never stated "as a specific price below the regular price." [398a, n. 2.] It is only the amount of *the reduction* that is advertised. [176a-180a.] Thus, assuming *arguendo* that the publicity given the discount and the prospect of competition effectively pressure the distributor into temporarily reducing his price, the advertisements leave his regular price levels unaffected. Significantly, the Board says nothing about the independent store distributor's pricing arrangements during normal, non-discount times. Rather, it discerns a general pattern of substantial control from what

the record reveals are only occasional periods of price reductions. [77a.]

Finally, and notwithstanding these advertisements, the record is clear that the distributors charge their independent customers whatever they can bargain for and grant or withhold discounts on the same basis. [378a; 74a, 187a-190a, 198a-200a.] Indeed, the Board's decision implicitly acknowledges this by its reference to the instances where the distributor's *customers* have, by threat of taking their business elsewhere, "effectively forced them to grant the discounts." [398a, n. 2.]

The absence of control over the distributors' prices to independent stores renders irrelevant the Regional Director's plaint that, in practical effect, these prices can vary by only a few cents. [378a.] The distributors involved here engage in a "penny" business. They sell potato chips not automobiles. And their practical pricing freedom is naturally limited by the nature of the product they market.

2. *The Company Does Not Control the Prices Charged Chain Stores.* The Board's perception of Company control over prices to chain stores is similarly defective. While the distributors are constrained, the source of that constraint is not the Company, and so the restriction can neither contribute to the Company's "control" nor support the conclusion of employee status.

The NLRB did recognize that the prices paid by chain stores are negotiated between the chains and the manufacturers.\* But the significance of this fact seems to have

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\* The Board suggests that the parties to these negotiations are the "stores" and the manufacturers. [398a, n. 2.] The record indicates that it is the *chain's* buyer, rather than each member store of what may be a widely-dispersed chain, who negotiates the prices. [74a-75a, 96a-97a.]

escaped the Board, for its acknowledgment is coupled with the *non-sequitur* that *the Company* "require[s]" the distributors "to abide by" the prices so negotiated. [398a, n. 2.]

It cannot logically be asserted that, absent a Company requirement, the distributors could charge chain stores more than the chain stores had agreed (with the manufacturer) to pay. Thus, even assuming that such requirement existed, it would add nothing to the Company's control of the distributor and cannot be regarded as an indicia of his employee status.

There is simply no evidence that such a Company-imposed requirement exists, or if it exists, that its violation has exacted some penalty. And this is so for one very good reason. So far as the record reveals, a distributor has not exacted from a chain store customer a price greater than its chain has agreed to pay.

Having no power in the matter of chain store prices, the Company cannot control distributors with respect thereto.

3. *The Additional Findings Made With Respect to Prices Do Not Support the Conclusion of Employee Status.* The Regional Director found that the Company has "suggested" prices. [375a.] It is clear, however, that the prices "suggested" by the Company are the prices suggested by the manufacturer, and that the manner of the Company's suggestion is simply to pass on to the distributors the manufacturer's suggested prices. [See *supra*, pp. 23-25.] The Company has and exercises no independent pricing control. In any case, and assuming that the Company can properly be considered as suggesting prices, the power of its suggestion appears minimal. As the Regional Director himself found,

distributors can and do vary from the suggested prices. [378a.]

The Regional Director also made reference to memoranda sent to distributors warning against the violation of uniform pricing regulations. [375a.] As the distributorship agreements make clear, however,\* these memoranda reflect the Company's concern (motivated by the Robinson-Patman Act, which even the distributors have no right to violate) that each distributor charge the same prices to his own similarly situated customers, not that he charge the same as all other distributors. In any event, the Company's mere warning against a violation of law cannot possibly invest it with employer-like control of the party warned.

Finally, the Regional Director emphasized that the Company "unilaterally establishes the price it charges the distributors . . . ." [377a.] We fail to see how a seller's offer of goods for sale at a set price renders his buyer an employee. Surely, the Company's reservation of the right to set its own price and profit structure is irrelevant to the status of the distributors.

***B. The Company Does Not Intrude Into the Daily Activities of the Distributors.***

Although the Regional Director found it "clear from the record that there is no day-to-day supervision of the distributors" [374a], both he and the Board contradictorily concluded that the Company pervasively (though not daily) intrudes into the distributor's affairs. This conclusion is unwarranted.

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\* See 298a, by which the distributor accepts the responsibility for granting the same discounts and rebates "to all those retailers who earn the same . . . ."

1. *The Company's Publication of a Book of Agreed-Upon Procedures Gives It No Control Over the Manner and Means of the Distributor's Performance.* According to the Board, the Company "requires compliance" with a 10-page booklet of procedures. [398a.]

Even assuming this is so,\* it should be noted that the individual distributorship agreements provide that the distributors will "abide by" this book of procedures [304a, 314a], and the book itself provides for amendment of the procedures only "with the help" and "with the concurrence" of the distributors themselves. [329a-330a.] Thus, these procedures cannot be said to have been forced upon the distributors or imposed—as they could be imposed by an employer—unilaterally.

In any case, it is clear that whether the procedures are expressed in hortatory or mandatory terms, they are no more than suggestions made by the Company on the basis of its experience in the business [55a-56a]—suggestions which the distributors are free to accept or reject. Even according to an IRA witness, the Company does not force or require distributors to follow the suggestions it makes with respect to the servicing of routes. [219a.]\*\*

Without regard to its context, the Board focuses on one supposed "mandatory" procedure providing that the stores

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\* One distributor-witness was not sure he had ever received the book. [230a.]

\*\* Based on one isolated instance, the Board concluded that the Company enforces compliance with even "hortatory" provisions, noting that the Company had installed certain shelving in a store despite a distributor's refusal to do so. [398a, n. 3.] But the record shows that, upon the distributor's refusal to provide the shelving requested by the store, it was a representative of the manufacturer—not the Company—who installed the shelving. [256a-258a.]

"must" be served at least weekly.\* But as both the procedure book and the Board's own excerpt suggest, the purpose of this provision is to assure that the stores be adequately supplied with fresh merchandise. (The merchandise if, of course, perishable.) This, we submit, is an important aspect of the end to be achieved by both the distributor and the Company, and one which the latter may legitimately seek to control.\*\*

2. *The Distributor Representatives Do Not Control the Distributors' Means and Methods.* The Board concluded that the Company's Distributor Representatives, or "DR's," "oversee" the distributors in various respects. [399a.] Whatever "oversee" may mean, it is not (even by the Board) equated with "supervise," and such "overseeing" or observing cannot certainly be equated with "control."

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\* [398a, n. 3.] The full paragraph from which the Board's excerpt comes reads [366a]:

"In order that the continued good will of all customers be sustained, it is necessary that proper attention be given to servicing accounts. This insures the continued expansion of your sales. Stores must be served at least once each week, and for larger independent stores and chains, as many more times each week as is necessary to keep the stands, racks and gondolas adequately supplied with fresh merchandise."

\*\* The Board attempts to buttress its conclusion by reference to another isolated occurrence during which the Company opened two distributors' trucks and delivered merchandise to their customers [398a-399a, n. 3.] The Board's recitation ignores that these distributors had announced the termination of their relationship with the Company, that the Company opened their trucks only after repeated and unsuccessful efforts to reach them, and that the Company made sure to take (and later give these distributors) an inventory of the merchandise on their trucks (for which they had paid) prior to its making the deliveries. [260a-262a.]

The record shows that the DR's do not exercise any regular or continuous supervision or control of the distributors. Indeed, they cannot even take it upon themselves to accompany a distributor on the latter's route; they do so only at the request and with the consent of the distributor himself. [26a-27a, 73a.]

The principal functions of the DR's are promotional. They are available to provide guidance and assistance to the distributors *when the distributors so request* and to seek to adjust complaints of inadequate service made by retail customers. The DR's *react* to situations brought to their attention by distributors or customers; they do not act affirmatively to control the distributors' operations. It is only in the context of these requests for assistance by distributors or complaints by customers that the DR's or others in the Company meet with the distributors to suggest or instruct how the routes may be properly serviced. [See 25a-29a, 153a-156a, 249a-250a.] And it cannot be doubted that their occasional intervention into the distributor-customer relationship has been beneficial to the distributors. The DR's have frequently persuaded retail customers, who have threatened to bar particular distributors from their stores, to accept continued service from the distributor involved. [25a-26a, 191a-196a.]

If the Company's incontrovertible right to control the result sought to be achieved has any meaning, and if it is entitled to enforce the distributor's contractual promise to use his best efforts to procure sales, the DR's must be accorded the authority (in the Regional Director's own language) "to ascertain generally what sort of job the distributor is doing." [376a.] While the DR's most certainly

do "ascertain" and observe, the record reveals no translation of the results of such observation into action affecting the distributor's performance.\*

**C. *The Company Has Not Infringed Upon the Transferability of the Distributor's Proprietary Right.***

It is not controverted that a distributor may transfer the proprietary right he has purchased for thousands of dollars and sell his route (or part thereof) at any time. [371a-372a.] But the Regional Director concluded that the Company "effectively controls such sale by reserving the right to reject any applicant and by setting down the monetary formula by which said sale shall be transacted." [378a.]

It is true that the distributorship agreements permit the distributor's sale of a route to an "accredited buyer" and refer to a formula for such sale.\*\* The Company extends credit to distributors, and is, we submit, entitled to investigate the credit-worthiness of a potential buyer. In any case, no proposed sale has ever been rejected by the Com-

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\* Thus, while the Regional Director called attention to the "one occasion" when a DR followed a distributor on the latter's route, he cited no consequences resulting therefrom. [376a.] Even the distributor who was allegedly followed had no idea—and apparently never learned—what, if anything, the DR had said to the former's customers. [242a.] In the same vein, the Board emphasized that Company representatives occasionally meet with distributors. [399a, n. 4.] Whatever significance may be attributed to such meetings, the record shows that the distributors' attendance is by no means compulsory. Asked what happens if the distributors fail to attend, the Company witness answered, "Nothing." [71a-72a.]

\*\* See 296a. It would seem, of course, that the Company's principal interest is to set forth a formula for the resale back to it of a distributor's route. [See 300a (¶14).]

pany. [78a-79a, 197a.] Moreover, the provisions respecting the sales price have been disregarded, and (as the Regional Director found) "in practice distributors have been allowed to sell for whatever price they can get." [372a.]

Thus, the "effective" control perceived by the Regional Director is no more than a theoretical control, and its *non-exercise* cannot foster the conclusion of employee status.

The Regional Director also concluded that the Company has the right to terminate the distributorship agreement "under certain circumstances of which it is the sole judge," and suggested that when a customer refused to deal with a distributor the Company's determination of where the "fault" lay was conclusive. [377a-378a.]

The Company, like most contracting parties, has the right to terminate the distributorship and can make the initial judgment as to the party at fault when a store declines further dealing with a particular distributor. But the distributorship agreements contain arbitration clauses and distributors can, like any one allegedly wronged by a breach of contract, challenge the Company's action before an arbitrator or in the courts. There is nothing in these agreements which precludes the distributor from so doing or arrogates to the Company the final determination of such matters.

Finally, the Regional Director erroneously concluded that one distributor had his route "taken away from him" as a result of dishonesty. [376a.] The distributor involved, who was accused by one of his customers of stealing mer-

chandise and consequently prohibited by the customer from further servicing the account, could have either sold his route or hired someone to operate it. He elected to and did sell. [157a-164a.] The route was by no means "taken away." \*

## POINT II

**In Determining That the Distributors Were Employees Rather Than Independent Contractors, the Board Misapplied the Applicable Legal Standard. The Board's Conclusion Is in Direct Conflict With the Result Reached in Other Similar, If Not Identical Cases, and Thus Deserves the Fair and Consistent Administration of the National Labor Relations Act.**

The determination whether an individual is an "employee" or an "independent contractor" is to be based upon the application of "general agency principles." *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 256 (1968). No "shorthand formula or magic phrase" may guide the an-

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\* One further administrative finding deserves comment. According to the Regional Director, the prospective purchaser of a route is required to complete "a standard form application for employment." [372a.] This conclusion is based solely on the testimony that *one* distributor was asked to fill out an "employment application" (of no specific form, "standard" or otherwise) and that he was told by a receptionist that "[e]verybody" had to do so. [254a-255a.] The Board accepted this hearsay report as reflective of a general practice despite testimony by the Company's Vice President and General Manager that the only form filled out by a prospective purchaser is a personal balance sheet or financial statement. [29a-30a, 32a-34a, 101a.] It should also be noted that the interest of such a prospective purchaser is solicited, *inter alia*, by Company advertisements in the "Business Opportunities"—not "Help Wanted"—columns. [29a.]

swer; rather the "total factual context" must be examined and "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 258.

We do not here quarrel with the Board's translation of "general agency principles" into the so-called "right to control" test. Rather, we submit that, while properly verbalizing the standard, the Board has erred in its application—that, in this case at least, the "right to control" test has become just the mechanistic "shorthand formula or magic phrase" against which the Supreme Court warned.

The right to control test does not preclude independent contractor status where some elements of control exist. Proper application of the test requires that distinctions be made between control over the manner and means and control over the result sought.

The Board failed to make this analysis. It failed to discern that the matters as to which the Company may (or attempts to) exercise some degree of control are all related to the promotion of a goal—continued and increased sales of the Company's franchised products—a goal which it shares with the distributors, and the attainment of which benefits both.

In *Brown v. N.L.R.B.*, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972), the court found "immaterial" to its determination regarding the status of certain newspaper dealers the fact that the asserted "employer" publisher desired complaints to be rapidly adjusted and sales promoted. As the court stated (*id.* at 703):

"Great importance may *not* be attached to the fact, as the trial examiner put it, that '[t]he result to be ac-

complished is, of course, the circulation and sale of the Company's newspapers.' Both the Company and the Dealer benefit from increased circulation and sales. The rapid adjustment of complaints and a desire to promote sales are mutual goals, whether the Dealers are employees, independent contractors, or franchisees. It is immaterial to the present inquiry that the Company wishes complaints to be adjusted or sales promoted."

Here, also, the Board failed to discern that the suggestions (even if properly characterized as "instructions") the Company may offer a distributor concerning the servicing of a route are suggestions as to a course of conduct (*e.g.*, making deliveries to a retail store with a frequency that will assure adequate stocks of fresh merchandise) which a distributor, motivated by the prospect of greater personal profit, would independently pursue. Cf. *Brown v. N.L.R.B.*, *supra*, in which the court termed the publisher's "admonitions" (or "requirement[s]," 462 F.2d at 701) that newspapers be dry and promptly delivered "precautions which the Dealers' self-interest compels." *Id.* at 703-704.

Moreover, the Board disregarded the Supreme Court's direction that "the total factual context" be assessed. *N.L.R.B. v. United Insurance Co.*, *supra*, 390 U.S. at 258. This "total factual context" must, we submit, include the structure of the industry and the nature of the business in which the individuals, whose status is in question, function. That a company observes certain practices or pursues certain methods of operation essential to or inherent in the nature of the business conducted, cannot be regarded as decisive on the question of status. See *News-Journal Co. v.*

*N.L.R.B.*, 447 F.2d 65, 67 (3rd Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).\*

Unlike the alleged "employer" in many cases involving the status of distributors or driver-salesmen, the Company here is engaged only in the distribution business. It does not also manufacture, process, or publish the goods it is franchised to sell, and it accordingly lacks (and thus cannot invest its distributors with) whatever attributes of power and authority would stem from a more variegated role.

The Board not only ignored the Company's narrow commercial role, but tarred it with "controlling" matters (*e.g.*, prices charged retail customers) with respect to which it is itself restricted. The Company simply cannot cede to its distributors rights it does not possess, and its inability so to do cannot transform independent contractors into employees.

The uniqueness of the judgment to be made in cases such as this cannot of course be used as a device to insulate the Board's decision from review. See *Burinskas v. N.L.R.B.*, 357 F.2d 822, 827 (D.C. Cir. 1966). The Board "cannot arbitrarily treat similar situations in dissimilar ways." *Carnation Co. v. N.L.R.B.*, 429 F.2d 1130, 1134 (9th Cir. 1970). And we submit that the total factual context surrounding the relationship between the Company and its

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\* In *News-Journal*, another case involving newspaper dealers, the Third Circuit acknowledged that "the maintenance of an effective circulation department by a large newspaper requires precise adherence to, as well as frequent amendment of, the delivery schedule," and, in light thereof, found "important but not decisive" the facts that the dealers, whose status was in dispute, were limited in their opportunities to vary the order of deliveries or the routes utilized. 447 F.2d at 67.

distributors here is essentially identical to that present in cases, decided by both the federal courts and the Board, where independent contractor status was found. Indeed, the case here is stronger for such status.

In *Frito-Lay, Inc. v. N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967)—a case of particular significance, because it also involved the snack food industry—the Court concluded that the single truck distributors of the products manufactured and sold by the Company were independent contractors despite the presence of factors heavily relied upon by the Board in the present case.

The *Frito-Lay* distributors could not set the price of merchandise to chain stores, and the Company published a list of suggested prices for non-chain customers. *Id.* at 185-186. In *Frito-Lay*, as here, the Company set the prices at which it sold its products to distributors—a fact that was not found helpful to the Board's argument. "Obviously," said the court, "the Company fixed the price on its merchandise sold to the distributors. So far as we are aware, that is the ordinary and usual manner of doing business." *Id.* at 186.

In *Frito-Lay*, the Board also relied on evidence showing that the Company conducted meetings with the distributors for the purpose of promoting sales and announcing specials; that Company representatives accompanied distributors on their routes to assist in sales, offered suggestions with respect to promotion, made advertising materials available, and directed distributors to help install promotional displays. *Id.* at 184-185.

Reliance on this evidence, said the Seventh Circuit, reflected the Board's failure "to distinguish between activi-

ties of the Company which related to the manner and means by which the result produced by the distributors was to be accomplished and those which related to the result itself." *Id.* at 184. Nor did this evidence dissuade the Court from concluding that the "chief concern of the Company as well as the distributors was in the end result, that is, the sale by the distributors of the products which they had purchased from the Company." *Id.* at 184.

In *Carnation Co. v. N.L.R.B.*, *supra*, 429 F.2d 1130, the court rejected the Board's characterization of certain dairy route salesmen as employees and denied enforcement of the Board's bargaining order though the evidence showed, *inter alia*, the following (*id.* at 1131-1132):

(1) That all route salesmen purchased their trucks from the Company, executing conditional sales contracts and assigning their accounts receivable to the Company.

(2) That all route salesmen were required to execute a trust agreement establishing a joint bank account with the Company, into which all proceeds from their delivery routes were required to be deposited and from which withdrawals could be made only over the Company's and salesman's signature.

(3) That the Company suggested retail prices.

(4) That the salesmen were required to install and pay for advertising material which the Company, at its option, decided to furnish.

(5) That the Company could terminate the distributorship agreement on one day's notice if the salesman breached, in which event the Company re-

possessed his truck without the need to account for the salesman's equity.

(6) That the salesman could not assign his rights under the distributorship agreement without the prior written consent of the Company.

In the court's view, all of the above constituted "[e]vidence of economic control" which was "not necessarily proof of the kind of control that is relevant to a decision whether a person is a contractor or an employee," but rather was the kind of control "found in a variety of 'franchise' arrangements oriented toward brand-name protection and market penetration." *Id.* at 1134.

In *Carnation* also there was not, as there is here, an agreement with the collective bargaining representative sanctioning the salesmen's entry into individual distributorship agreements. To the contrary, the Company in *Carnation* unilaterally made such arrangements over the Union's explicit objection. See *id.* at 1131, 1135.

Similarly, in *Meyer Dairy, Inc. v. N.L.R.B.*, 429 F.2d 697 (10th Cir. 1970), the distributors were found to be independent contractors although the Company set the prices which the distributors paid and suggested the prices at which they should resell; although the distributorship contracts set certain standards that were to be maintained if the distributors were to retain their territory; although the Company afforded the distributors "some advantages" with respect to the purchase and servicing of their trucks, and permitted them to use Company vehicles and employees; and although the Company, free of charge, furnished printed materials and forms to promote the sale of and

to assist the distributors in handling the products. *Id.* at 700-701.

Of extreme importance is the fact that in none of the above cases does there appear to have been any financial investment even approaching the substantial \$4,500-\$5,000 down payment made and \$20,000 obligation undertaken by the distributors here.

Indeed, in *Brown v. N.L.R.B.*, *supra*, the newspaper dealers found to be independent contractors had not even purchased—and thus, of course, could not sell or assign—a dealership, a customer list, or good will. 462 F.2d at 702, 705.

The Company in *Brown* suggested resale prices to which many dealers adhered; required dealers to deliver papers to customers no later than a certain specified time; unilaterally increased the number of papers dealers were obliged to purchase; had its supervisory personnel make suggestions about billing methods and product displays; and operated a service for the handling of customer complaints. *Id.* at 701, 702.

Notwithstanding all of these factors of alleged “control,” the court found that the dealers were independent contractors. In so doing, it emphasized, *inter alia*, that their individual contracts with the publisher—just like the distributorship contracts here—explicitly defined the relationship created as that of independent contractor and attempted to insulate the company from liability for the dealers’ acts. “The contract,” said the court, “while not conclusive, is an important indication of the parties’ conception of their relationship.” *Id.* at 703.

Finally, we submit that the Board has failed to follow or satisfactorily distinguish its own precedent—its decision in *Gold Medal Baking Co.*, 199 NLRB No. 132 (Oct. 27, 1972).

In *Gold Medal*, where certain distributors of bakery products were held to be independent contractors, the Board found it significant that “. . . despite the earlier history of representation by the Petitioner [Union], the Employer and the distributors in the distributorship agreements expressly stated their intention to create an independent contractor relationship.” *Id.* at p. 6.

Although the Decision on Review in this case refers to the Company's change in business methods (and erroneously states that the route salesmen were “required” to execute distributorship agreements),\* it makes absolutely no mention of the route salesmen's “earlier history of representation” and the explicit “independent contractor” terminology of the *optional* distributorship agreements.

Indeed, whereas the Company here obtained the collective representative's agreement to the withdrawal of the route salesmen-distributors from the bargaining unit, the employer in *Gold Medal* initially agreed that the distributors would continue to be represented by the union, and then changed its mind. 199 NLRB No. 132, p. 2.

Moreover, and although the Board attempts to distinguish *Gold Medal* in part on the ground that the distributors there “were not required by the company to adhere to suggested resale prices” [397a], the fact is, as the *Gold Medal* decision itself clearly states, that those distributors

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\* [399a.] See pp. 12-13, *supra*.

departed from the suggested resale prices only "on occasion." 199 NLRB No. 132, p. 7.\*

The only other basis upon which the Board purported to distinguish *Gold Medal* was that the distributors there "carried out their responsibilities under the distributorship agreements without supervision by the company." [397a.]

Without repeating all we have earlier said on this subject, we assume that, though it did not "supervise," Gold Medal did not surrender its rights under the distributorship agreements—which included the "absolute right" to terminate if a distributor failed "to sell or service all of the customers assigned to him in a diligent manner or cause the loss of any such customer . . . ." 199 NLRB No. 132, p. 4. We assume further that an attempt by Gold Medal to ascertain whether such failure had occurred would not have made its distributors employees. And, we submit, the Company here has, in the Board's parlance, "supervised" in exactly the same way.

In the penultimate paragraph in *Gold Medal*, the Board summarized the factors leading it to the conclusion of independent contractor status. Leaving aside the distributors' "occasion[al]" variation from the suggested resale prices and the matter of supervision, those factors—each of which is present here—were as follows (*id.* at pp. 6-7):

1. The distributors own and maintain their own trucks at their own expense. [Here, the distributors must supply their own trucks, which they may purchase (as 14 of 52 have) or lease from any source.]

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\* The company in *Gold Medal* was both manufacturer and seller, and it (not its franchisor) suggested resale prices. *Id.* at pp. 2, 4.

2. The distributors are given a proprietary interest of substantial value in their distributorships which they can sell to a third party.\* [The same exists here.]
3. The distributors can add customers to their routes, if they so desire, and some have done so. [The same is true here.]
4. Although the agreement specifies that the distributors shall keep accurate records of all purchases and sales and make them available to the Employer for inspection, all record keeping is in fact done by the distributors themselves. [Here, the agreement obligates the distributor to maintain accurate books (which some distributors do and some do not, 126a) that are to be turned over to the Company only upon termination, and requires the distributor to furnish the Company with certain limited information for specific purposes (which, again, some do and some do not, 133a-134a). See 278a, 299a, 301a-302a.]
5. The distributors make their own collections (except for chain stores) and if they extend credit, assume the risk of loss for nonpayment. [The same is true here.]
6. The distributors no longer receive fringe benefits. [The same is true here.]

Not only does the record here contain all the elements found crucial to the Board's "independent contractor" conclusion in *Gold Medal*, but in addition the conclusion in that case was made notwithstanding the presence of a host of factors pointing toward employee status. Some of these

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\* Such sale was subject to Gold Medal's prior written approval. *Id.* at p. 4.

“negative” factors—none of which is present here—were as follows:

1. In *Gold Medal*, the company had the right, under the distributorship agreements, to *assign* additional customers to a distributor. *Id.* at p. 3.
2. In *Gold Medal*, the distributor agreed to pay a specified amount of “liquidated damages” if, without the company’s written consent, he purchased products from anybody else. *Id.* at pp. 3-4.
3. In *Gold Medal*, distributors could not exchange customers without the prior approval of the company, and, even with such approval, there could be no payment upon such exchange. *Id.* at p. 4.
4. In *Gold Medal*, all but one distributor had the company’s name painted on their trucks. *Id.* at p. 5, n. 2.\*

In sum, the result reached by the Board here simply cannot be squared with the result in *Gold Medal* and is markedly inconsistent with the conclusions reached in other nearly-identical cases. And such inconsistency is particularly disturbing where the applicable standard is as broad and amorphous as the “right to control” test. If, as the statute clearly permits, others (like the Company and the distributors here) are to be able responsibly to structure an independent contractor relationship—if consistency in the administration and interpretation of the Act is to be served—the petition for review must be granted and the Board’s bargaining order must be denied enforcement.

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\* Here, the distributors’ trucks do not bear the Company’s name. Rather, if the distributor wishes, he may have the manufacturer’s name painted on the truck at the *manufacturer’s* expense. [47a-48a.]

### CONCLUSION

For the reasons set forth above, it is respectfully requested that the petition for review be granted and that the Board's Decision and Order of February 22, 1974, as amended February 27, 1974, be set aside in all respects.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- x  
LORENZ SCHNEIDER CO., INC., :  
Petitioner, :  
-against- : 74-1336  
NATIONAL LABOR RELATIONS BOARD, : and  
Respondent. : 74-1495  
----- x

Certificate of Service

The undersigned certifies that two copies of the Brief for Petitioner Lorenz Schneider Co., Inc. (as printed) and one copy of the Joint Appendix have this day been served by first class mail upon counsel for Respondent National Labor Relations Board at the following address:

Elliott Moore, Esq.  
Deputy Associate General Counsel  
National Labor Relations Board  
Washington, D. C. 20570

Att: Peter Carre, Esq.  
Litigation Services

Dated: New York, New York  
August 23, 1974

Howard L. Ganz  
Howard L. Ganz

Sir:

Please take notice that the within is a true copy of this day duly entered and filed herein in the office of the Clerk of.....

of New York

Dated, New York, 19

Yours, etc.,

PROSKAUER ROSE GOETZ & MENDELSON

Attorneys for

300 PARK AVENUE

NEW YORK, N. Y. 10022

To

Attorneys for

Sir:

Please take notice that an order of which the within is a true copy will be presented for settlement and signature herein to Mr. Justice

at

of

this Court at

in the Borough of

City of New York,

on the day of , 19

at o'clock in the noon.

Dated, New York, 19

Yours, etc.,

PROSKAUER ROSE GOETZ & MENDELSON

Attorneys for

300 PARK AVENUE

NEW YORK, N. Y. 10022

To

Attorneys for

74-1336 and  
INDEX NUMBER 74-1495 197

UNITED STATES COURT OF APPEALS  
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LORENZ SCHNEIDER CO., INC.,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF SERVICE

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All communications should be referred  
to Mr.

Due service of a copy of the within

is hereby admitted.

Dated, New York

To

Attorneys for